83-192

No. 82-_____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

MICHAEL JEAN BOUCLIN, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHARLES F. MOSES
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Billings, Montana 59103
COUNSEL FOR PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

1. Was Petitioner denied fundamental due process, his privilege not to incriminate himself, his right to confront witnesses, his right to compel testimony of witnesses, and his right to have a telephone tap search warrant issue only on probable cause, when he was prohibited from questioning the Canadian officials thereon?

2. Even if the Canadian telephone tapes of Petitioner's telephone calls were admissible in spite of Petitioner's constitutional rights in 1 above, were his same rights violated by the Court's refusal to permit testimony to establish facts to shock the Court's conscience as to the issuance without probable cause of the Canadian search order thereon and as

obtained by the joint efforts of Canadian and American officers?

3. Did the Court usurp the jury's right to find the facts when it refused Petitioner's defense that more than proof of one sale is required in a conspiracy?

4. Should Petitioner's wife's testimony, admitted over objection on the spousal privilege, and the $7,000 cashier's check seized without a warrant, have been allowed to prove the second person required in a conspiracy?

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Petitioner, Michael Jean Bouclin, respectfully prays that this Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The United States Court of Appeals for the Ninth Circuit affirmed Petitioner's conviction of (1) conspiring to possess cocaine with intent to distribute, (2) making a false statement in a customs declaration and (3) bringing more than $5,000 in monetary instruments into the United States without filing the required report, in its decision without published opinion, cause number 82-1589, on March 7, 1983, reported at 703 F.2d 577. The court's memorandum is attached in the appendix at page A. The Judgment

and Commitment of the United States District Court for the District of Montana, Great Falls Division, in cause number CR-82-25-GF is unreported and is attached in the appendix at page J.

JURISDICTION

The Memorandum and Decision of the United States Court of Appeals for the Ninth Circuit was rendered on March 7, 1983. A timely petition for rehearing was denied on June 1, 1983. This petition, which will be mailed on August 1, 1983, is timely as required by Supreme Court Rule 20.1.

The jurisdiction of this court is invoked under 28 U.S.C. Section 1254 (1).

The basis for federal jurisdiction in the court of first instance, the Montana

District Court, are 21 U.S.C Section 841(a)(1)(Count I), 18 U.S.C. Section 1001(Count IV) and 21 U.S.C. Section 846 (Count V) as set forth in the Indictment which is attached in the appendix at page N.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment Four

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be 'seized'."

Amendment Five

"No person...shall be compelled in any criminal case to be a witness against himself, nor be deprived of liberty...without due process of law..."

Amendment Six

"In all criminal prosecutions the accused shall enjoy the right to a...trial, by an impartial jury... be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor..."

STATEMENT OF THE CASE

A. Procedural History

On March 11, 1982, a five count indictment was filed in the United States District Court for the District of Montana, Great Falls, Division, charging Petitioner under three separate counts with the crimes of (1) conspiracy to possess with the intent to sell cocaine (Count I), (2) making a false statement in a customs declaration (Count IV) and, (3) bringing more than $5,000 into he United States without filing the required report thereon. Defendants Oscar Gil, Kenneth Wilson Jackson and Angel Manuel

Rivera, were also charged with violating the same Count I, and Rivera was also charged under Counts II and III. The defendant Oscar Gil was never arrested under this indictment. The prosecutor moved to dismiss the indictment as against the defendant Jackson, prior to Petitioner's trial. Rivera under a plea agreement with prosecutor, pled guilty to Count III and Counts I and II were dismissed as against him.

Petitioner's pre-trial motion to suppress tape recordings of his telephone conversations by Canadian officers was denied. His trial on July 20, 1982, resulted in a verdict of guilty as to Counts I, IV and V. The Court sentenced Petitioner to ten years with three year parole term to be attached to any parole

received as to Count I, and to three years each on both Counts IV and V, to run concurrently.

Petitioner's appeal from this conviction and sentence to the United States Court of Appeals for the Ninth Circuit was affirmed in an unreported memorandum decision in Cause No. CR 82-1589 on March 7, 1983 (703 F.2d 577). A timely petition for rehearing and suggestion that the same be heard en banc was denied on June 1, 1983.

Petitioner has been charged with crimes in Canada, arising from the exact same facts, been convicted thereon and is presently incarcerated thereon.

B. STATEMENT OF FACTS

Petitioner is a married Canadian farmer with three children residing at

Elrose, Saskatoon, Saskatchewan, Canada.

On December 7, 1981, a police officer with the Royal Canadian Mounted Police in Canada (hereafter R.C.M.P.) filed an affidavit, authorization and application to tap petitioner's private telephone, the telephone at his father's residence and the telephone at his farm (Defendant's Exhibit B admitted at RT "238"). Exhibits C and D (admitted at RT "238") were renewal orders thereon extending the period of authorization for the telephone taps. Under Canadian law, the affidavit and supporting information filed to obtain such telephone tap order was sealed, is privileged and confidential, and despite petitioner's requests therefore, the same was never produced to petitioner, his counsel or to

the Court and the Canadian police officers all refused to testify thereon, with their claimed privilege therefore sustained by the Court.

R.C.M.P. officers traced the numbers of certain calls tapped to New York City through United States officers and discussed their investigation of petitioner and the information received from tapping his telephone with U.S. Officers. Although all such testimony at the trial was that no such discussions were held prior to the time that the R.M.C.P. requested information as to the New York City telephone numbers, the factual information set forth in the confidential presentence report states the facts indicating this was done earlier.

Based on this investigation, the

R.M.C.P. alerted U.S. officials that petitioner would come to Great Falls, Montana on February 19, 1982 to purchase cocaine from co-defendant Oscar Gil.

Petitioner was under surveillance by U.S. officers from the time he first landed his airplane in Havre, Montana on such date, drove to Great Falls, and until he was arrested the next day. When he landed in Havre, the customs officer had been instructed to secure his signature to the required customs form as to the funds then being transported by him, and such officer obtained Bouclin's signature and a check mark on such form that he was not then carrying more than $5,000. Petitioner did not then file a further report with customs itemizing any monetary instruments then being carried

by him exceeding $5,000.

Petitioner drove a rented car to Great Falls, stopping at several bars on the way, checked into a hotel in Great Falls, went to several bars in Great Falls, and then went to a different hotel and to co-defendant Rivera's room.

Rivera informed petitioner as to the envelope he had carried from New York, he looked at it, did not touch it, and he then left Rivera's room. (RT 753). About an hour and a half later, Rivera received a telephone call from petitioner advising him to call Gil in New York and that he was cancelling the deal and would not be back (RT 755).

The morning of February 19, 1982, Rivera was leaving his hotel room to travel back to New York City when he was arrested, consented to a search, and

cocaine was found in his possession (Rt 757).

Rivera pled not guilty to the three counts of the indictment against him, and just prior to petitioner's trial, entered into a plea agreement with the government, on which the first two counts were dismissed against him, he entered a plea of guilty to Count III, and agreed to testify in petitioner's trial. (RT 758).

Following petitioner's arrest that same day, special customs agent James McEwen obtained a search warrant and seized certain currency from his hotel room (RT 775), seized additional currency without a search warrant from his possession at the jail (RT 777), and then again without a warrant seized his

airplane at the Havre airport and a $7,000 cashier's check found therein (RT 110).

Over his objections thereto (RT 494-513), the Court played to the jury Exhibit 7, a composite tape containing certain of petitioner's tapped telephone conversations as selected by the prosecutor, repeated the playing of the tapes to the jury with earphones, repeated certain portions of total of nine times, and then permitted the jury to take the tapes and play the same in the jury room, such taped telephone conversations showing conversations by petitioner and others as to the government's claimed conspiracy to make the cocaine purchase here involved.

The Trial Court, on the grounds of comity, refused to allow petitioner's

counsel the right to confront and cross-examine Canadian officers testifying as to the facts known by them at the time they applied for the telephone tap authorizations in Canada and to prove his contention that no probable cause existed therefor. There could not have been evidence sufficient to convict, much less even to allow the Court to give this case to the jury without the telephone tapes.

The Trial Court allowed over objections, a telephone tape by petitioner's wife saying "It's Gil" as to one certain telephone call and a $7,000 cashier's check made payable to an Oscar Gil, seized without a warrant from petitioner's airplane, after his arrest while he was in custody, while his airplane was under surveillance, and

after the government had already applied properly for and secured a search warrant to seized certain money from his hotel room. These were the only two items of evidence linking him to any other defendant to prove a conspiracy.

The Trial Court refused to instruct the jury on Petitioner's defense that one sale alone was not sufficient for a conspiracy, thus usurping and taking this factual issue from the jury.

The Circuit Court affirmed these decisions.

ARGUMENT

1. WAS THE PETITIONER DENIED FUNDAMENTAL DUE PROCESS, HIS PRIVILEGE NOT TO INCRIMINATE HIMSELF, HIS RIGHT TO CONFRONT WITNESSES, HIS RIGHT TO COMPEL TESTIMONY OF WITNESSES, AND HIS RIGHT TO HAVE A TELEPHONE TAP SEARCH WARRANT ISSUE ONLY ON PROBABLE CAUSE, WHEN HE WAS PROHIBITED FROM QUESTIONING THE CANADIAN OFFICIALS THEREON?

If petitioner was an American citizen, and if all facts involved here had taken place in the United States, his conviction could not stand constitutional scrutiny and it would be reversed. The fundamental constitutional question involved is whether a conviction as to a violation of United States law in a United States Court is permissible where clear constitutional rights have been violated, only because those rights were violated in Canada. There should be no difference. Marbury v. Madison, 5 U.S.(1 CRANSCH 1803) determined that the Constitution must be taken seriously, and we must see that "its commands, and above all its promises, are to be translated into practice."

Petitioner's defenses included facts that a Canadian wiretap operation

authorization was obtained there without probable cause and when the Canadian officials there involved had no facts as to any violation of either Canadian or American law, that this would shock the Court's conscience, but because Canadian law makes the application for such an authorization confidential, and that the facts thereon cannot be disclosed by the Canadian officials, the United States Trial Court denied petitioner's rights to prove this. No consideration was given his cross-examination rights established by Davis v. Alaska, 415 U.S. 308. No attention was paid Gouled v. United States, 255 U.S. 298 (1921) holding that the protection against unreasonable search and seizure and the privilege against compulsory self-

incrimination "are to be regarded as of the very essence of constitutional liberty."

We suggest a clear analogy here to Mapp v. Ohio, 367 U.S. 643 (1961) where this court held that as a matter of due process, evidence obtained by search in violation of the Fourth Amendment is inadmissible in a State court as it is in a Federal court and that this "makes very good sense." There this court further said that

> "Denying short cuts to only one of two cooperating law enforcement agencies tends naturally to breed legitimate suspicious of 'working arrangements' whose results are equally tainted."

There this court further said as to the "right to be secure against rude invasions of privacy by State officers" that this is constitutional

in origin and that the court will:

> "no longer permit it to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment. Our decision, founded on reason and truth, gives to the individual no more than that which the constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice."

Petitioner suggests this court clearly faced a more difficult similar decision in its cases involved claimed presidential constitutional privileges and that this law from United States v. Nixon, 418 U.S. 638, should likewise apply to petitioner's trial.

> "We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and

> comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure the justice is done, it is imperative to the function of the courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense."

Petitioner, even as a Canadian alien is "guaranteed due process of law by the Fifth and Fourteenth Amendments." And this court has:

> "...clearly held that the Fifth Amendment protects aliens whose presence in this Country is unlawful from invidious discrimination by the Federal government." Plyler v. Doe, __U.S.__, 72 L.Ed. 2d 786 (1982).

The Supreme Court of Canada in District Court v. Royal Canadian Shows,

66 C.C.C. 2d 125 (1982) has held just to the contrary, and that in this instance, the question of admissibility must be decided under American law.

The significance is that the Montana District Court, as the Court of the forum, must decide the admissibility of evidence based upon our constitutional requirements. To do otherwise would carve out an exception merely based upon the place where the evidence was obtained. U. S. v. Maher, (9th Cir. 1980) 645 F.2d 780, relied upon by the courts below to justify their refusal to permit petitioner to obtain the evidence necessary to challenge this telephone tap evidence must be reversed. This important question of Federal law which has not been, now should be settled by

this court and in a way not in conflict with this court's decision on these important constitutional rights.

2. EVEN IF CANADIAN TELEPHONE TAPES OF PETITIONER'S TELEPHONE CALLS WERE ADMISSIBLE IN SPITE OF PETITIONER'S CONSTITUTIONAL RIGHTS IN ONE ABOVE, WERE HIS SAME RIGHTS VIOLATED BY THE COURT'S REFUSAL TO PERMIT TESTIMONY TO ESTABLISH FACTS TO SHOCK THE COURT'S CONSCIENCE AS TO THE ISSUANCE WITHOUT PROBABLE CAUSE OF THE CANADIAN SEARCH ORDER THEREON AND AS OBTAINED BY THE JOINT EFFORTS OF CANADIAN AND AMERICAN OFFICERS?

Petitioner does not agree that the only purpose of the exclusionary rule is to deter unconstitutional conduct by American officials only. What is involved here are the clear constitutional rights and commands. What is involved is the integrity of our judicial system and our courts. As these apply here, petitioner contends that even if the law established by U. S. v. Maher,

cited above, that "Neither our Fourth Amendment nor judicially created exclusionary rule applies to acts of foreign officials" is correct, even if his constitutional rights to confront witnesses by cross-examining them, to obtain their compulsory attendance was proper as is questioned above, that the court's failure to permit him to develop the facts sufficient to come within the clear exceptions set forth in Maher require reversal. The Ninth Circuit court in Maher held:

> "There is no evidence American officials participated in the alleged wiretap, nor is it shown tha Canadian police were acting as agents for their American counterparts in conducting the purported eavesdropping. The investigation of Maher was initiated and controlled by Canadian police, with only limited support and assistance from American officials on this side of

> the border. Accordingly, the "joint venture" exception to this general rule of inapplicability to foreign officials as stated in Rose and Stonehill is not invoked.
>
> Nor is this 'a case where federal officials had induced foreign police to engage in conduct that shocked the conscience' to warrant the district court in exercising its supervisory powers to exclude the evidence. See Birdsell v. United States, 346 F.2d 775, 782 at n. 10 (5th Cir. 1965), cert. denied, 382 U.S. 963, 86 S.Ct. 449, 15 L.Ed. 366 (1965); United States v. Rose, supra, at 1362. No inducement by federal officials had been shown."

The record is clear that petitioner was denied the right to prove that his case came within either one or both of these exceptions.

This was not an idle contention. Even though the Assistant United States Attorney advised the court that there had been no joint participation, the confidential presentence report filed

with the Court at the time of petitioner's sentencing stated that:

> "Commencing in December of 1981, the Great Falls resident office of the Federal Drug Administration had been assisting the Royal Canadian Mounted Police Drug Detachment in Saskacthewan in identifying possible sources of cocaine and marihuana in the United States and investigating an organized smuggling and distribution group headed by Michael Jean Bouclin in Saskatchewan."

Then during certain limited cross-examination of one Canadian official he did then admit that he had previously testified under oath in a Canadian proceeding that at the time he made the application for the telephone tap that he then had no information as to the importation of drugs. A part of a further question was:

> "And did you have any information as to allegations that Bouclin or Bouclin Farms or Kutz would be involved in the possession of

> restricted drugs or the possession for the purpose of restricted drugs or possession for the purposes of trafficking in controlled drugs? Do you recall what your answer was?"

And this officer then testified that and his answer was:

> "Yes, my answer to that question was, 'No', also. That is reported in the document."

Another officer testified that he had indicated in his affidavit to the Canadian authorities that petitioner's father was "associated with drug traffickers at the time of the affidavit" whereas the fact then was that he:

> "...had nothing to indicate he was a drug trafficker or associated with drug traffickers other than perhaps his son."

Petitioner is entitled to further develop these facts and to prove through the testimony of the Canadian officials involved that his case comes within one

or both of these exceptions. If the prosecution should decide that it does not want to disclose such information in petitioner's trial, then the result must be the same as in those cases where the government has had to decline prosecution rather than permit a defendant to obtain information necessary for his defense, but which is information the government thinks should not be disclosed on the grounds of national security.

3. DID THE COURT USURP THE JURY'S RIGHT TO FIND THE FACTS WHEN IT REFUSED PETITIONER'S DEFENSE THAT MORE THAN PROOF OF ONE SALE IS REQUIRED IN A CONSPIRACY?

Petitioner contended that as a fact there was only one possible cocaine sale involved, which would not be sufficient to prove a conspiracy, relying on Varelli

v. United States (7th Cir. 1969) 407 F.2d 735, 748, and United States v. Priekskorn, (9th Cir. 1981) 658 F.2d 631, 634. This was a factual question for the jury to determine, under instructions thereon submitted by petitioner. The Ninth Circuit court affirmed the Trial Court's decision and determination as a matter of fact that more than one sale was involved, and that petitioner was not entitled to these instructions or this defense, and to have this factual determination made by his jury.

We begin with Blackstone Commentaries, bk. 3, 379.

> "The trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English law. And if it has so great an advantage over others in regulating civil property, how much must that advantage be heightened when it is applied to criminal cases!"

This quote from Thomas Jefferson, letter to Thomas Paine (1789), is appropriate:

> "I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution."

We also like Justice Holmes's statement in Horning v. District of Columbia, 254 U.S. 135 (1929) that "the jury has the power to bring in a verdict in the teeth of both law and facts."

In Gregg v. Georgia, 428 U.S. 153 (1976):

> "Juries are invariably given careful instructions on the law and how to apply it before they are authorized to decide the merits of a lawsuit. It would be virtually unthinkable to follow any other course in a legal system that has traditionally operated by following prior precedents and fixed rules of law...When erroneous instructions are given, retrial is often required. It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations."

4. SHOULD PETITIONER'S WIFE'S TESTIMONY, ADMITTED OVER OBJECTION ON THE SPOUSAL PRIVILEGE, AND THE $7,000 CASHIER'S CHECK SEIZED WITHOUT A WARRANT, HAVE BEEN ALLOWED TO PROVE THE SECOND PERSON REQUIRED IN A CONSPIRACY?

The only possible co-conspirator was Oscar Gil. None of the telephone taped conversations identified him as being a party thereto with the exception of one statement made by petitioner's wife, who answered the phone, and then turned to her husband and said, "It's Gil." This went in over petitioner's objections that it violated the Canadian criminal code, Martin's Criminal Code, 1978, Section 178.16(5) and this court's latest decision on a spousal privilege, Trammel v. United States, 445 U.S. 40, (1980).

Katz v. U.S., (1967) 389 U.S. 347, holds that "(S)earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment - subject only to a few specifically established and well - delineated exceptions." Stoner v. California, (1964) 376 U.S. 483 at p. 486, adds that "The search...without warrant...can survive constitutional inhibition only upon a showing that the surrounding facts brought it within one of the exceptions to the rule that a search must rest upon a search warrant."

U.S. v. Murrie, (6th Cir. 1976) 534 F.2d 698, holds that "(T)he burden of proof of exigent or exceptional circumstances to justify...a deviation from the Fourth Amendment is upon those

who are seeking the advantage of exception." "(T)he burden is on those seeking the exception to show the need for it." U.S. v. Jeffers, (1951) U.S. 248, at p. 51.

As this cashiers check made payable to Gil was the only piece of physical evidence linking petitioner as to this claimed conspiracy with Gil, the prejudice from its admission in evidence against him is obvious. Its receipt in evidence where no search warrant had been obtained therefore, when it was clear the same could have been done and should have been done, requires that it should have been excluded. Why didn't the Government include this in the search warrant it obtained to seize the money from petitioner's hotel room? "(T)he

exclusionary rule is calculated to prevent not to repair. Its purpose is to deter - to compel respect for the constitutional guarantee in the only effectively available way, by removing the incentive to disregard it." Elkins v. U.S., (1960) 364 U.S. 206, at p. 217.

This was never calculated to be or considered as a border search at any time until long after trial and then was used after the fact to try to justify this illegal search without a warrant.

CONCLUSION

For the reasons stated and the authorities cited, petitioner prays that this Court grant this petition for a writ of certiorari.

DATED August 1, 1983.

MOSES LAW FIRM
The Terrance - Penthouse
300 North 25th Street
P. O. Box 2533
Billings, Montana

By: Charles F. Moses
CHARLES F. MOSES
ATTORNEYS FOR PETITIONER

FILING AND SERVICE VERIFICATION

STATE OF MONTANA)
) ss.
County of Yellowstone)

CHARLES F. MOSES, of legal age, being first duly sworn on his oath, deposes and says that he is the attorney for petitioner herein, and that he personally has timely filed this Petition by depositing the same at the Main United States Post Office in Billings, Montana, first class postage prepaid and affixed, and properly addressed to the Clerk of

this Court, on August 1, 1983, which is timely as within 60 days of this date of denial of petitioner's timely Petition for Rehearing before the respondent United States District Court of Appeals for the Ninth Circuit on June 1, 1983 (which sixtieth day fell on Sunday, July 31, 1983).

Affiant further states that this Petition was at such same time and place served by mail on the Respondent United States of America by mailing three copies thereof to:

Solicitor General
Department of Justice
Washington, D.C. 20530

and three copies thereof to:

Byron H. Dunbar
United States Attorney
Federal Building
Billings, Montana 59101
Attention: R. L. Zimmerman
Assistant United States Attorney

CHARLES F. MOSES

SUBSCRIBED AND SWORN to before me this 1st day of August, 1983.

Notary Public for the State of Montana, Residing at Billings, Montana
My Commission Expires: June 10, 1984

Appendix

A

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 82-1589
DC #CR-82-25-1-PGH

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MICHAEL JEAN BOUCLIN,

Defendant-Appellant.

MEMORANDUM

Appeal from the United States District Court for the District of Montana
Paul G. Hatfield, District Judge, Presiding
Argued and submitted February 7, 1983

Before: WALLACE, ANDERSON, and SCHROEDER, Circuit Judges.

Michael Bouclin appeals from his conviction of conspiring to possess

cocaine with intent to distribute, making a false statement in a customs declaration and bringing more than $5,000 in monetary instruments into the United States without filing the required report. Appellant raises several issues.

Bouclin first argues that the district court erred in denying a continuance motion sought by new counsel a few days before trial. The district court noted that the motion was prompted by appellant's own desire to substitute counsel and that a long, unexplained delay occurred before appellant moved for that substitution. The district court did not abuse its discretion. United States v. Veatch, 647 F.2d 995, (9th Cir. 1981); United States v. Hernandez, 608 F.2d 741, 746 (9th Cir. 1979).

Appellant next challenges the

admission of telephone recordings made pursuant to a Canadian wiretap which, he argues, was improperly authorized under United States constitutional standards. This court has clearly stated, however, that neither the fourth amendment nor the exclusionary rule applied to searches and evidence obtained by foreign officials outside the United States. United States v. Maher, 645 F.2d 780 (9th Cir. 1981). The only exceptions are when American officials induce foreign police conduct which shocks the conscience or when foreign officials act as agents for their American counterparts in a "joint venture". See Maher, supra, 645 F.2d at 782-82; United States v. Rose, 570 F.2d 1358, 1361-62 (9th Cir. 1978); Stonehill v. United States, 485 F.2d 738, 743 (9th

Cir. 1968), cert. denied, 395 U.S. 960, 89 S.Ct. 2102 (1969).

The investigation in this case, like the investigation in Maher, was, according to the record before us, "initiated and controlled by Canadian police, with only limited support and assistance from American officials." Maher, supra, 645 F.2d at 783. There is no evidence of American inducement or conduct that amounts to a "joint venture," and the trial court properly admitted the evidence. Appellant's argument that he should have been allowed discovery, in contravention of Canadian law, to try to show American involvement is without merit. He was entitled to allowable discovery of records of United States Authorities, and such opportunities were not foreclosed.

E

Appellant next argues that the jury should have received further proffered instructions based on two defense theories. The first theory is that the government did not prove a conspiracy because it only established a single buyer-seller relationship. See United States v. Prieskorn, 658 F.2d 631, 634, (8th Cir. 1981). The second is that he withdrew from the conspiracy and that withdrawal is a complete defense to a conspiracy charge.

The jury must be instructed on a defense theory if there is evidence to support it and a proper request is made. Prieskorn, supra, 658 F.2d at 636. See also United States v. Kenny, 645 F.2d 1323, 1337 (9th Cir.), cert. denied, 452 U.S. 920,, 101 S. Ct. 3059 (1981). Here,

the government proved more than a single buyer-seller transaction which physically involves a single transient agreement and a small amount of drugs consistent with personal use. See Prieskorn, supra, 658 F.2d at 634. The evidence presented clearly showed that this transaction involved a large amount of drugs and that it was part of a venture extending beyond the single buyer and seller. See Prieskorn, supra, 658 F.2d at 635, citing United States v. Magnanops, 543 F.2d 431 (2d Cir. 1976), cert. denied, 429 U.S. 1091, 97 S. Ct. 1100 (1977); United States v. Torres, 503 F.2d 1124 (2d 1974).

Appellant's position with respect to the withdrawal defense is also untenable. The proposed instruction that withdrawal is a complete defense to illegal

participation in a conspiracy is contrary to well settled principles. Participation occurs when an overt act is taken in furtherance of an illegal agreement; "to avoid complicity in the conspiracy, one must withdraw before any overt act is taken in futherance of the agreement." United States v. Monroe 552 F.2d 860, 864 (9th Cir.), cert. denied, 431 U.S. 972, 97 S. Ct. 2936 (1977).

Bouclin also argues that certain evidence was improperly admitted. There is no merit to his contention that the statement "it's Oscar," made by his wife when she answered the phone, was subject to the spousal privilege. The statement was not a confidential communication which the privilege was intended to

protect. See United States v. Lefkowitz, 618 F.2d 1313, 1317-18 (9th Cir.), cert. denied, 449 U.S. 824, 101 S. Ct. 86 (1980), citing Blau v. United States, 340 U.S. 332, 333, 71 S. Ct. 301 (1951). Moreover, appellant's wife never asserted any alleged privilege. See Trammel v. United States, 440 U.S. 40, 100 S. Ct. 906 (1980) (privilege must be asserted by spousal witness).

The admission of a $7,000 cashier's check made payable to Oscar Gil was not reversible error. Although the check was seized in a warrantless search of Bouclin's plane, the search was an extended border search which requires no warrant or probable cause. United States v. Expericueta-Reyes, 631 F.2d 616, 619, (9th Cir. 1980). Bouclin's plane was under constant surveillance from the time

it landed; there is no doubt that the check was put there prior to entry and, therefore, that it was illegally brought into the country. See United States v. Jacobson, 647 F.2d 990, 993 (9th Cir.) cert. denied, 454 U.S. 398, 102 S. Ct. 897 (1981); Expericueta-Reyes, supra, 631 F.2d at 619-20. Moreover, any error in the search, and therefore in the admission of the check, due to the time that elapsed after entry into the country was harmless beyond a reasonable doubt.

Appellant's final argument is that he was prejudiced because certain portions of the wiretap tapes were replayed and because the jury was allowed to take the tapes as well as transcriptions into the jury room. However, he trial judge did not commit any error in this regard. The

tapes were evidence which the jury was entitled to consider in their deliberations. Tape transcriptions have long been recognized as valuable aids to juries. See, e.g., United States v. Tornabene, 687 F.2d 312, 317 (9th Cir. 1982); United States v. Turner, 528 F.2d 143, 167-68 (9th Cir.), cert. denied, 423 U.S. 996, 96 S. Ct. 426 (1975).

Affirmed.

Decided and filed March 7, 1983.

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

GREAT FALLS DIVISION

No. CR-82-25-GF

UNITED STATES OF AMERICA,

Petitioner,

v.

MICHAEL G. BOUCLIN,

Defendant.

JUDGMENT AND COMMITMENT

On the 4th day of October, 1982, came Robert Zimmerman, Assistant United States Attorney for the District of Montana, and the defendant, MICHAEL JEAN BOUCLIN, appearing in his proper person and represented by his counsel, Charles F.

Moses, Esq.;

And the defendant having been convicted upon his plea of not guilty by the jury of the offenses charged in Counts I, IV and V of the indictment herein;

And the defendant having been asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary appearing or being shown to the Court,

IT IS BY THE COURT ORDERED AND ADJUDGED that the defendant, MICHAEL JEAN BOUCLIN, be committed to the custody of the Attorney General of the United States, or his authorized representative, for imprisonment for the term of ten (10) years on Count I.

It is the further order of this court

that the defendant serve a special parole term of three (3) years.

IT IS ADJUDGED that on Count IV the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a term of three (3) years.

IT IS ADJUDGED that on Count V the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a term of three (3) years.

Said sentences on Count IV and Count V are to run concurrently with the sentence on Count I.

s/ Paul G. Hatfield
PAUL G. HATFIELD
UNITED STATES DISTRICT JUDGE

Filed October 6, 1982

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

GREAT FALLS DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

MICHAEL JEAN BOUCLIN,
OSCAR GIL,
KENNETH WILSON JACKSON, and
ANGEL MANUEL RIVERA,

Defendants.

Counts 1 & 2: 21 U.S.C. Section 841(a)(1)
($25,000 and/or 15 years)
Counts 3: 21 U.S.C. Section 843(b)
($30,000 and/or 4 years)
Counts 4: 18 U.S.C. Section 1001
($10,000 and/or 5 years)
Counts 5: 21 U.S.C. Section 846
($500,000 and/or 5 years)

INDICTMENT

THE GRAND JURY CHARGES:

I.

1. From on or about the 6th day of February, 1982, to on or about the 19th day of February, 1982, in the District of Montana, and elsewhere, OSCARE GIL, MICHAEL JEAN BOUCLIN, KENNETH WILSON JACKSON, and ANGEL MANUEL RIVERA, the defendants herein, wilfully and knowingly did combine, conspire, confederate and agree together, with each other, and with diverse other persons whose names are to the Grand Jury unknown, to commit an offense against the law of the United States, that is:

To knowingly and unlawfully possess with intent to distribute cocaine, a Schedule II narcotic controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

All in violation of Title 21, United States Code, Section 846.

OVERT ACTS

In furtherance of the aforesaid conspiracy and to effect the objects and purposes thereof, OSCAR GIL, MICHAEL JEAN BOUCLIN, KENNETH WILLIAM JACKSON, and ANGEL MANUEL RIVERA performed overt acts in the District of Montana, and elsewhere, including but not limited to the following:

1. On or about February 6, 1982, OSCAR GIL, from the State of New York, telephoned MICHAEL JEAN BOUCLIN, in the Province of Saskatchewan, Canada, to discuss the sale of cocaine to MICHAEL JEAN BOUCLIN.

2. On or about February 14, 1982,

MICHAEL JEAN BOUCLIN, from the Province of Saskatchewan, Canada, telephoned OSCAR GIL and provided him with a "safe" number, at which the said BOUCLIN could be called to discuss further details concerning the sale of cocaine.

3. On February 14, 1982, OSCAR GIL, from the State of New York, telephoned MICHAEL JEAN BOUCLIN to inquire as to whether or not the 18th day of February, 1982, would be convenient for the cocaine transaction an during said conversation the quantity of cocaine to be purchased as well as the details of the transaction were determined.

4. On February 16, 1982, KENNETH WILSON JACKSON, from the Province o Saskatchewan, Canada, called OSCAR GIL in the State of New York to confirm that cocaine would be sent to Great Falls,

Montana, for said KENNETH WILSON JACKSON.

5. On February 7, 1982, MICHAEL JEAN BOUCLIN, from the Province of Saskatchewan, Canada, called OSCAR GIL and advised OSCAR GIL that MICHAEL JEAN BOUCLIN had all of the money for the cocaine transaction.

6. On February 18, 1982, in the State of New York, OSCAR GIL recruited ANGEL MANUEL RIVERA to transport the cocaine from the State of New York to Great Falls, in the State and District of Montana.

7. On February 18, 1982, ANGEL MANUEL RIVERA transported approximately 1024.2 grams of cocaine from the State of New York to Great Falls, in the State and District of Montana.

8. On February 18, 1982, MICHAEL JEAN

BOUCLIN flew from Canada to Havre, Montana, and then drove to Great Falls, Montana.

9. On February 18, 1982, ANGEL MANUEL RIVERA at Great Falls, Montana, called OSCAR GIL in the State of New York to advise him of his room number in Great Falls, Montana.

10. On February 18, 1982, MICHAEL JEAN BOUCLIN at Great Falls, Montana, called OSCAR GIL in the State of New York to determine what room number ANGEL MANUEL RIVERA was in in Great Falls, Montana.

11. On February 18, 1982, in Great Falls, Montana, MICHAEL JEAN BOUCLIN and ANGEL MANUEL RIVERA met for purposes of allowing MICHAEL JEAN BOUCLIN to examine the cocaine.

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COUNT II

On or about February 18, 1982, in Great Falls, in the State of District of Montana, ANGEL MANUEL RIVERA knowningly and unlawfully did possess with intent to distribute approximately one kilogram of cocaine, a Schedule II, narcotic controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

COUNT II

That on or about the 18th day of February, 1982, in the District of Montana, ANGEL MANUEL RIVERA knowingly and intentionally did use a communication facility, that is, a telephone, in facilitating a conspiracy to possess, with intent to distribute, concaine, a schedule II narcotic controlled substance, a felony under Title 21,

U.S.C. Section 846, in the ANGEL MANUEL RIVERA used said telephone to transmit to OSCAR GIL, in the State of New York, a communication to advise the said OSCAR GIL of his (Rivera's) room number so that the said OSCAR GIL could advise another where the cocaine was located, in violation of 21 U.S.C. section 843(b).

On February 18, 1982, the defendant OSCAR GIL aided, abetted, counseled, commanded and procured the commission of the offense alleged above in violation of Title 18 United States Code, Section 2 and Title 21, United States Code, Section 843(b).

9. On February 18, 1982, ANGEL MANUEL RIVERA at Great Falls, Montana, called OSCAR GIL in the State of New York to advise him of his room number in Great

Falls, Montana.

10. On February 18, 1982, MICHAEL JEAN BOUCLIN at Great Falls, Montana, called OSCAR GIL in the State of New York to determine what room number ANGEL MANUEL RIVERA was in in Great Falls, Montana.

11. On February 18, 1982, in Great Falls, Montana, MICHAEL JEAN BOUCLIN and ANGEL MANUEL RIVERA met for purposes of allowing MICHAEL JEAN BOUCLIN to examine cocaine.

COUNT II

On or about February 18, 1982, in Great Falls, in the State and District of Montana, ANGEL MANUEL RIVERA knowingly and unlawfully did possess with intent to distribute approximately one kilogram of cocaine, a Schedule II, narcotic controlled substance, in violation of

Title 21, United States Code, Section 841 (a)(1).

COUNT IV

On or about the 18th day of February, 1982, in the District of Montana, MICHAEL JEAN BOUCLIN wilfully and knowingly did make and cause to be made a false, fictitious and fraudulent statement and representation as to a material fact in a matter within the jurisdiction of the United States Department of the Treasury, in that in a Customs Delcaration submitted to the said Department of the Treasury, MICHAEL JEAN BOUCLIN stated and represented that he was not carrying over $5,000.00 (or the equivalent value in any currency) in monetary instruments, whereas in truth and fact, as he then knew, he was carrying approximately

$38,000.00 in United States currency an approximately $29,374.00 in Canadian currency, and $600.00 in traveler's checks in U. S. funds, in violation of 18 U.S.C. Section 1001.

COUNT V

On or about the 18th day of February, 1982, in the District of Montana, MICHAEL JEAN BOUCLIN wilfully did transport, from Canada to Havre, Montana, a place within the United States, on one occasion, monetary instruments exceeding $5,000.00 without filing a report in violation of Title 31, United States Code, Section 1101 and said violation was committed in the futherance of another violation of Federal law, to-wit: conspiracy to possess cocaine, a Schedule II narcotic controlled substance, with the intent to distribute it, in violation of Title 21,

United States Code, Section 846.

A TRUE BILL.

s/ Joyce Carroll
FOREPERSON

s/ Byron H. Dunbar
BYRON H. DUNBAR
UNITED STATES ATTORNEY